STATE OF SOUTH CAROLINA )	BEFORE THE CHIEF PROCUREMENT OFFICER
COUNTY OF RICHLAND )	
)	DECISION
In the Matter of Protest of:	
)	CASE No. 2010 - 134
)	
American Services, Inc.	
)	
)	
Materials Management Office )	POSTING DATE: October 11, 2010
IFB No. 5400001900	
Contract Labor Services for the Budget &)	
Control Board General Services Division)	MAILING DATE: October 11, 2010

This matter is before the Chief Procurement Officer (CPO) pursuant to a letter of protest from American Services, Inc. (American) filed September 24, 2010 under the provision of Section 11-35-4210(1)(b) of the South Carolina Consolidated Procurement Code (Code). With this invitation for bids (IFB), the Materials Management Office (MMO) attempts to procure a six month contract for custodial and maintenance services for the South Carolina Budget and Control Board (Board), General Services Division. On September 13, 2010, MMO posted a notice of intent to award the contract to Marathon Staffing, Inc. (Marathon). American challenges that decision.

In order to resolve the matter, a hearing was held before the CPO on October 8, 2010. Hank Wall, Esquire represented Marathon, and Frank S. Potts, Esquire represented the Board's General Services Division. John Stevens, State Procurement Officer, was present for MMO.

# **NATURE OF PROTEST**

American's letter of protest is attached and incorporated herein by reference.

## **FINDINGS OF FACT**

The following dates are relevant to the protest:

- 1. On August 20, MMO issued IFB No. 5400001900. (Ex. 1)
- 2. On September 10, 2010, MMO posted its intent to award to Marathon. (Ex. 8)
- 3. On September 13, 2010, MMO amended its intent to award to Marathon. (Ex. 9)
- 4. On September 23, 2010, another bidder, Kneece's Carolina Cleaning Service (Kneece's), filed a protest of the intent to award with the CPO.
- 5. On September 23, 2010, MMO suspended its intent to award due to the protest. (Ex. 10)
- 6. On September 24, 2010, American filed its protest of the intent to award with the CPO challenging MMO's determination that it was non-responsive.

## **DISCUSSION**

Marathon has moved to dismiss this protest as untimely. The CPO agrees.

Section 11-35-4210(1)(b) of the Code provides in relevant part:

Any actual bidder, offeror, contractor, or subcontractor who is aggrieved in connection with the intended award or award of a contract shall protest to the appropriate chief procurement officer...within ten days of the date award or notification of intent to award, whichever is earlier, is posted in accordance with this code...(Emphasis added)

In order to be timely, the protest must be in writing and received by the CPO within the above timeframe. Section 11-35-4210(2)(b). The Code defines "days" to mean calendar days and specifies how a period of time prescribed by the Code is to be calculated. Section 11-35-310(13).

In this case, it is undisputed that the notice of intent to award to Marathon was posted on September 10, 2010, and a corrected notice of intent to award, also to Marathon, was posted on September 13, 2010. Even if the designated period of time began to run on the latter date, any protest was due to the CPO by at least 5:00 PM on September 23, 2010. However, it is undisputed that American did not file its protest of this intent to award with the CPO until September 24, 2010.

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<sup>&</sup>lt;sup>1</sup> On October 7, 2010, Kneece's withdrew its protest.

The South Carolina Procurement Review Panel (Panel) has repeatedly held that the time for

filing cannot be waived. See In Re: Protest of Jones Engineering Sales, Inc., Case No. 2001-8 (finding

that the CPO did not have jurisdiction to rule on the protest issue because the time for filing protests of

the solicitation is jurisdictional and may not be waived); In Re: Protest of National Cosmetology Ass'n,

Case No. 1996-17 (finding that "where the appeal is not taken within the time provided, jurisdiction

cannot be conferred by consent or by waiver"); In Re: Protest of Vorec Corporation, Case No. 1994-9

(finding that a protest of award was untimely when it was filed one day after the deadline established

by the Code prior to its amendment). The Panel has explained its rationale for why this time limit is

jurisdictional and cannot be waived as follows:

[I]t is essential to the operation of government that challenges its purchasing decisions be limited. If the time for filing protests can be

waived, the state will be unable to determine with certainty when it can enter into a contract with one vendor for vital goods and services without

the danger of being liable to another vendor.

In Re: Protest of Oakland Janitorial Services, Inc., Case No. 1988-13.

Here American filed its protest beyond the time allowed under the Code. Accordingly, the

motion must be granted, and this protest is dismissed as untimely filed.

**DETERMINATION** 

Voight Shealy

For the aforementioned reasons, the protest is dismissed.

R. Voight Shealy

Chief Procurement Officer

for Supplies and Services

October 11, 2010

Columbia, S.C.

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# STATEMENT OF RIGHT TO FURTHER ADMINISTRATIVE REVIEW

The South Carolina Procurement Code, in Section 11-35-4210, subsection 6, states:

(6) Finality of Decision. A decision pursuant to subsection (4) is final and conclusive, unless fraudulent or unless a person adversely affected by the decision requests a further administrative review by the Procurement Review Panel pursuant to Section 11-35-4410(1) within ten days of posting of the decision in accordance with subsection (5). The request for review must be directed to the appropriate chief procurement officer, who shall forward the request to the panel or to the Procurement Review Panel, and must be in writing, setting forth the reasons for disagreement with the decision of the appropriate chief procurement officer. The person also may request a hearing before the Procurement Review Panel. The appropriate chief procurement officer and an affected governmental body shall have the opportunity to participate fully in a later review or appeal, administrative or judicial.

Copies of the Panel's decisions and other additional information regarding the protest process is available on the internet at the following web site: <a href="www.procurementlaw.sc.gov">www.procurementlaw.sc.gov</a>

FILE BY CLOSE OF BUSINESS: Appeals must be filed by 5:00 PM, the close of business. *Protest of Palmetto Unilect, LLC*, Case No. 2004-6 (dismissing as untimely an appeal emailed prior to 5:00 PM but not received until after 5:00 PM); *Appeal of Pee Dee Regional Transportation Services, et al.*, Case No. 2007-1 (dismissing as untimely an appeal faxed to the CPO at 6:59 PM).

FILING FEE: Pursuant to Proviso 83.1 of the General Appropriations Act for Fiscal Year 2010-2011, "[r]equests for administrative review before the South Carolina Procurement Review Panel shall be accompanied by a filing fee of two hundred and fifty dollars (\$250.00), payable to the SC Procurement Review Panel. The panel is authorized to charge the party requesting an administrative review under the South Carolina Code Sections 11-35-4210(6), 11-35-4220(5), 11-35-4230(6) and/or 11-35-4410...Withdrawal of an appeal will result in the filing fee being forfeited to the panel. If a party desiring to file an appeal is unable to pay the filing fee because of hardship, the party shall submit a notarized affidavit to such effect. If after reviewing the affidavit the panel determines that such hardship exists, the filing fee shall be waived." PLEASE MAKE YOUR CHECK PAYABLE TO THE "SC PROCUREMENT REVIEW PANEL."

LEGAL REPRESENTATION: In order to prosecute an appeal before the Panel, a business must retain a lawyer. Failure to obtain counsel will result in dismissal of your appeal. *Protest of Lighting Services*, Case No. 2002-10 (Proc. Rev. Panel Nov. 6, 2002) and *Protest of The Kardon Corporation*, Case No. 2002-13 (Proc. Rev. Panel Jan. 31, 2003).

# Skinner, Gail

From: Protest-MMO [Protest-MMO@mmo.sc.gov]

Sent: Friday, September 24, 2010 3:15 PM

To: \_MMO - Procurement; Shealy, Voight; Skinner, Gail

Subject: FW: Protest of Award - Solicitation 5400001900 - Contract Labor Services for the B&CB

From: Paul Nipper[SMTP:PNIPPER@AMSVCS.COM]

Sent: Friday, September 24, 2010 3:13:59 PM

To: Protest-MMO

Subject: Protest of Award - Solicitation 5400001900 - Contract Labor Services for the B&CB

Auto forwarded by a Rule

September 24, 2010

Chief Procurement Officer State of South Carolina Materials Management Office 1201 Main Street, Suite 600 Columbia, SC 29201

Ref: Protest of Award - Solicitation 5400001900 - Contract Labor Services for the B&CB

#### Dear Chief Procurement Officer:

American Services, Inc. would like to submit a Protest of Award on Solicitation 5400001900. American Services was considered non-responsive based on a paragraph concerning insurance that we included in our proposal (see Memo for Record, fax 9-13-10). American Services only reiterated with what it deemed was clarifying language in the insurance requirement contained in the RFP. We carry all the required insurance and ask for no changes to be made to the insurance requirements. No attempt was made by the State to ask for further clarification.

American Services request the Chief Procurement Officer to reverse the non-responsive classification and allow us to participate in the bid process.

We appreciate your consideration and look forward to our continued participation in the bid process.

Sincerely,

Paul Nipper President of Development American Services, Inc. 1300 Rutherford Road Greenville, SC 29609 864-292-7450